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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 242

WILEY H. CADDEL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

J. HOWARD SULLIVAN,
JOSEPH T. ENRIGHT,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioner above named respectfully petitions the Supreme Court to grant a Writ of Certiorari in the above entitled matter after a decision by the Supreme Court of the State of California which denied petitioner's petition for a Writ of Error Coram Nobis. The decision was filed on May 17, 1951, being a memorandum decision with no opinion filed.

The specific grounds upon which this petition for certiorari is based can be more graphically stated following a summary of the essential facts. It should be noted, however, that a hearing is necessary to secure uniformity of decision in California to settle important questions of law.

Statement of the Case

That petitioner, Wiley H. Caddel, was one of the defendants in the above entitled action; that on December 3, 1948 he was convicted by a jury on the five counts contained in the indictment; that the first count of the indictment charged conspiracy to violate Sections 67 and 68 of the Penal Code, being a conspiracy to give and offer bribes to executive officers of the State of California and a conspiracy to ask for and agree to receive bribes as executive officers and employees of the State; that the second count of the indictment charged conspiracy to violate Section 380a of the Penal Code, being conspiracy to have control either as owner, agent, employee or otherwise of slot machines; that count three charged the petitioner with having given a bribe to Sheriff B. G. Broaddus of Mendocino County on April 30, 1948; that count four charged petitioner with having given a bribe to Sheriff Broaddus on June 3, 1948; that count five charged petitioner with having given a bribe to Sheriff Broaddus' deputy, William White, on June 3, 1948.

That petitioner was sentenced on all five counts for the term prescribed by law on each of the five counts providing that the terms of count one and five should run concurrently, that the terms of count three and four should also run concurrently but should commence at the termination of the term of imprisonment imposed under counts one and five, and that the term imposed under count two should commence upon the termination of the term imposed under count three and four.

That petitioner duly made a motion for a new trial which was denied; that thereafter an appeal to the District Court of Appeal, Third Appellate District, was duly prosecuted and a decision thereon was rendered on June 10, 1950 by the Appellate Court and that thereafter a petition for re-hearing was duly made which re-hearing was denied except as to

modifying the decision heretofore rendered in one inconsequential aspect; which modification was rendered on June 24, 1950; thereafter petitioner was on June 10, 1950 denied a hearing by the Supreme Court of the State of California, Chief Justice Gibson and Justice Schauer dissenting from the denial of the petition for hearing.

That the opinion of the District Court of Appeal is reported in 98 A.C.A. 1, 219 P. 2d 519; that at no time prior to the motion for a new trial did the petitioner or his attorney come into the possession of the facts set forth in the affidavit of Paul McCarty, the original of which is attached to petitioner's petition filed with the District Court of Appeal, and states as follows:

"STATE OF CALIFORNIA,
County of Mendocino, ss:

Paul McCarty, being first duly sworn, deposes and says:

That he was indicted by the Grand Jury of Mendocino County in 1948 along with several other individuals among whom was one Wiley H. Caddel;

That the crimes for which he and the other defendants, including Mr. Caddel, were indicted were upon the charges of conspiring to give and solicit bribes to the Sheriff of Mendocino County and to the Attorney General of the State of California; that prior to the indictment, your affiant had been requested by the Sheriff of Mendocino County, one B. G. Broaddus, to ascertain from other individuals and in particular one Fred Grange, whether there was a conspiracy on foot to attempt to place illegal slot machines in various resorts in Mendocino County.

That as a result of this request, your affiant acted as an undercover agent for said Sheriff; and did report to said Sheriff various conversations that he had in respect to the alleged conspiracy;

That as a result of the investigations carried on by various law enforcement agencies in the County of Mendocino, your affiant was indicted as above set forth; that upon being indicted he thereafter questioned the Sheriff and the District Attorney of Mendocino County as to the reason for his indictment; that he raised this question of his indictment for the reason that there was no evidence of his guilt, rather, he had acted as above set forth only upon the request of the Sheriff;

That after his indictment and before the trial of the action, your affiant was informed by the District Attorney, James E. Busch and the Sheriff that he had nothing to worry about but rather, the case as against your affiant would be dismissed as there was not sufficient evidence to convict him but rather, as indicated, the only evidence relating to your affiant was that he had acted in consort with the Sheriff for investigative purposes; that your affiant informed the District Attorney that he believed that statement of the District Attorney and the Sheriff that the case as against your affiant would be dismissed but that he wanted further assurance thereof from the Crime Commission of the State of California; that as a result of this request for this further assurance, the District Attorney in Mendocino County, Mr. Busch, and your affiant, went to the offices of the attorney for the Crime Commission, one Mr. Warren Olney, in San Francisco at which time and place your affiant was introduced to Mr. Olney by Mr. Busch who stated that he had promised to dismiss the case as against Mr. McCarty and had told Mr. McCarty that he had nothing to worry about; that at this time and place Mr. Olney in the presence of Mr. Busch assured your affiant that the case as against him would be dismissed and that he need not worry about such dismissal being requested by the prosecution and granted for the reason that there was no evidence against your affiant;

That the case as against your affiant was dismissed by the trial court, being the Superior Court of the State of California in and for the County of Mendocino,

upon the request and motion made by the prosecution in the matter; that such motion to dismiss was not made until after such time that the Sheriff of Mendocino County had testified on behalf of the prosecution relative to proposed conversations he had had with your affiant regarding the identification of an individual who was one of the co-defendants in the action; that this testimony of the Sheriff was to the effect that your affiant had identified Wiley H. Caddel, one of the defendants, as being the individual who in effect stated that everything was fixed with the office of the Attorney General of the State of California so as to enable illegal slot machines to be operated in the County of Mendocino; that your affiant in his testimony flatly contradicted this proposed conversation between himself and the Sheriff; however, as set forth above in this affidavit, at the time of the Sheriff's testimony your affiant was still a defendant in the action and it was not until after the Sheriff's testimony that the prosecution moved to dismiss the case as against your affiant, which motion was promptly granted by the Court; that the reason for granting the motion was the lack of any evidence of any kind against your affiant; that the evidence introduced at the trial against your affiant was identical with the evidence introduced at the hearings before the Grand Jury of Mendocino County for the reason that the only evidence, as set forth herein, was to the effect that your affiant acted for and on behalf of the Sheriff in attempting to ascertain whether there was a conspiracy to operate illegal slot machines in Mendocino County;

That your affiant told no one of these promises and representations that a dismissal would be granted as against your affiant until the 10th day of November, 1950, at which time your affiant disclosed all of the facts, representations and promises as set forth in this affidavit to J. Howard Sullivan, an attorney-at-law; that the disclosures and conversations had with Mr. Sullivan was in the City of Ukiah, Mendocino County in the offices of Burke and Rawles, attorneys at law; that

those present during the time of the disclosures to Mr. Sullivan were your affiant and Mr. Sullivan.

Dated this 31 day of Jan., 1951.

(S.) PAUL MCCARTY.

Subscribed and sworn to before me this 31 day of January, 1951.

(S.) ETHEL HUMPHREY,
Notary Public in and for the
County of Mendocino,
State of California.

My Commission Expires April 30, 1952."

That as a result of the facts set forth in the affidavit of Mr. McCarty, petitioner was denied a fair and just trial for the reason that testimony of Sheriff Broaddus was introduced at the trial and heard by the jury, which testimony as to the effect that Mr. McCarty had told Sheriff Broaddus that petitioner had a conversation with Mr. McCarty whereby petitioner was to receive and take $4.00 per week per slot machine as a bribe to the office of the Attorney General in return for which that office would not interfere with the illegal operations of the slot machines in Mendocino County; that this testimony of Sheriff Broaddus was highly prejudicial and had Mr. McCarty not been a defendant in the action, it would have been incompetent for the reason of it being hearsay; that had this conversation not been related there would have been no testimony upon which petitioner could have been convicted; that it is plain from the facts as now ascertained and contained in the affidavit of Paul McCarty, Mr. McCarty was indicted and remained in the case as a defendant for the sole purpose of eliciting the proposed conversation between himself and Sheriff Broaddus which conversation, as indicated, was testified to by Sheriff Broaddus; that Mr. McCarty was kept as a defendant for that purpose cannot be questioned in view of the facts as set forth in his affidavit.

That petitioner and his attorney exercised every possible means to ascertain the true facts before the trial, during the trial and before the time for the motion of the new trial, but neither petitioner nor his attorney by the exercise of the utmost diligence possible could uncover the facts as set forth in Mr. McCarty's affidavit; that these facts were first made known to petitioner through his present attorney, J. Howard Sullivan, following Mr. Sullivan's investigation which led to the uncovering of these facts on the 10th day of November 1950.

That petitioner was further prejudiced to the extent of not having a trial by a jury of his choice and selection for the reason that at one point during the trial the State and all of the defendants, including petitioner, except the defendant McCarty, accepted a jury and thereafter Mr. McCarty exercised a peremptory challenge excusing one juror; that when Mr. McCarty exercised this challenge, he thereby caused a new and different jury to be selected other than the one accepted by petitioner. Hence, petitioner was not in fact tried by a jury of his choice and selection for the reason that had Mr. McCarty's case been dismissed prior to trial, obviously Mr. McCarty could have no discretion in the matter of the selection of the jury that was to try petitioner.

That all of the facts in this petition, other than those contained in the affidavit of Paul McCarty, were set forth in the opinion of the District Court (98 A. C. A. 1, 219 P. 2d 519); that the only new facts which this Court is herewith confronted are those set forth in the affidavit of Mr. McCarty.

Which affidavit of Mr. McCarty is supported by the affidavit of Joseph A. Ball, attorney-at-law, the original of which is attached to petitioner's petition filed with the Dis-

trict Court, and who represented petitioner during the trial of this action, which affidavit states:

"STATE OF CALIFORNIA,
County of Los Angeles, ss:

Joseph A. Ball, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice before all courts of the State of California and that as such attorney at law he represented Mr. Wiley H. Caddel in the trial held on five counts charged in the indictment and sentenced thereon to the terms prescribed by law; that he has read the affidavit of Paul McCarty, and the facts related by Mr. McCarty in his affidavit were not made known to your affiant until after November 10, 1950 and were then ascertained by your affiant through J. Howard Sullivan, attorney-at-law, who had conducted an investigation which resulted in bringing to light the fact that Mr. McCarty had been promised immunity and promised that the case would be dismissed as against him, all as related in Mr. McCarty's affidavit.

That your affiant prior to the trial, during the trial and prior to the motion for a new trial, exercised every method and mode conceivable to him for the purpose of discovering and ascertaining all facts pertinent to the defense of Mr. Caddel, but that at no time until after November 10, 1950 was he informed of the facts as set forth in the affidavit of Mr. McCarty.

Dated this 19th day of February, 1951.

(S.) JOSEPH A. BALL.

Subscribed and sworn to before me this 19th day of February, 1951.

(S.) GLADYS GUEST,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 21, 1951."

Grounds of Petition

In the case of *People* v. *Reid,* 195 Cal. 249, there is found a rather comprehensive statement of the function of the Writ of Error Coram Nobis and a succinct statement of the nature of the Writ. In that case the Court stated:

> "The office of the ordinary writ of error at common law was to remove the record of the case from an inferior to a superior court for the purpose of enabling the latter to review claimed errors of law appearing upon the face of the record. The principal office of the writ of error coram nobis was to enable the same court which had entered the judgment to reconsider it in a case in which the record still remained before the court. . . . The most comprehensive statement of the function and office of this writ which has come to our notice is the following from 5 Encyclopaedia of Pleading and Practice at page 29: 'The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common law disability still exists, or insanity, it seems at the time of the trial; or *a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress, fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.*' In addition to the scope of this writ as above stated, it would lie upon a judgment in the King's Bench for 'error in the process or through fault of the clerk.' This appears to refer to such cases as where the clerk had improvidently issued a writ of execution, upon a judgment which had been rendered but had not yet been entered. Or where an execution had been inadvertently issued and levied after the granting of a supersedeas and where a default had been inadvertently entered before the expiration

> of the time to plead or had been predicated upon a false return of service of process. . . . At the time this writ came into general use there was no remedy by appeal or by motion for a new trial, as these new remedies have come into existence by statutory enactment, they have supplanted this ancient writ as to so much of its former scope as is comprehended in and covered by the statutory remedies." (Emphasis ours.)

As may be seen from the statement found in the above quoted case where "a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress, fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have, prevented the rendition and entry of the judgment questioned", the judgment of the verdict of guilty as far as Mr. Caddel is concerned could not have been rendered, or if so rendered by the jury, would have been subject to reversal by the trial court for the reason that the only evidence against Mr. Caddel that connected him with the alleged conspiracy was the purported statement made by Paul McCarty to the Sheriff of Mendocino County, Mr. B. G. Broaddus.

As indicated in the opinion of the Appellate Court in the case of *People* v. *Griffin, Mulligan and Caddel,* at the time the Sheriff related the conversation from the witness stand, Mr. McCarty was still a defendant in the action; however, as set forth in the affidavit of Mr. McCarty in this petition, there was never any intention on the part of the District Attorney to prosecute Mr. McCarty, rather, he had been promised that the case against him would not so be prosecuted, but rather, it would be dismissed. Further, after a jury had been selected and agreed upon by all of the parties concerned, with the exception of Mr. McCarty, Mr. McCarty exercised a peremptory challenge

as against one of the agreed jurors thereby causing the petitioner, Mr. Caddel, to be tried by a jury not of his own selection. In touching upon this point, the Appellate Court stated in its opinion:

> "The next assignment of prejudicial misconduct on the part of the district attorney is based upon a charge that immunity had been promised in advance to defendants Paul McCarty and Robert Gray, and that by delaying dismissals as to these defendants, appellant Caddel was compelled to select a jury while they were being tried as co-defendants. This same contention has been considered, supra, in the appeal of William Mulligan. For the reasons heretofore given we hold the conduct of the district attorney not to have been prejudicial. The record does not support the claim that the prosecution intended to dismiss the charges against defendants Gray and McCarty before the jury was selected. Neither does it show that appellant Caddel was forced to accept a jury unsatisfactory to him because of the presence of the other two co-defendants."

As noted in the quoted portion of the Appellate Court's opinion, it is stated that "the record does not support the claim that the prosecution intended to dismiss the charges against defendants Gray and McCarty before the jury was selected". With this statement of the Appellate Court in mind, coupled with the facts set forth in Mr. McCarty's affidavit and the affidavit of Mr. Joseph A. Ball, the attorney who represented Mr. Caddel at the time of trial, and the petition of Mr. Caddel, it is apparent that there was no way possible for the record to indicate these facts at the time this appeal was considered. Such being the case, these facts must necessarily constitute facts which have only been ascertained since the time for the motion for the new trial in the matter had elapsed. Consequently, these facts must constitute a valid basis for the considera-

tion of the application of the remedy afforded by the Writ of Error Coram Nobis.

In regard to the dismissal of the case as against Mr. McCarty, the Appellate Court stated in its opinion in this matter:

> "The trial of the case commenced on November 8, 1948. During its course, and before the People had rested their case, the court granted motions of the district attorney to discharge defendants Gray and McCarty in order that each might be made a witness for the People, pursuant to the provisions of section 1099 of the Penal Code."

It is now apparent that the reason for the dismissal of the case against Mr. McCarty was not for the purpose of making him a witness for the People, but rather, was in furtherance of the promises and representations made to him by the District Attorney and the Sheriff. Hence it must follow, that the sole purpose of indicting and keeping Mr. McCarty in the case as a defendant for any period of time whatsoever was solely for the purpose of eliciting from the Sheriff a purported statement made by Mr. McCarty to the Sheriff, which statement would have been inadmissible as being hearsay if Mr. McCarty had not been a defendant in the action. While it is true that the trial court instructed the jury that the evidence related by Mr. McCarty was to be confined only as to himself not as to the other defendants, the damage done, it in this case amounted to the conviction of Mr. Caddel, cannot be cured by such instruction.

In the recent case of *Krulewitch* v. *United States,* 336 U.S. 440, 93 L. Ed. 790, Mr. Justice Jackson stated:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize pros-

ecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction. * * *"

Hence it is clearly evident that if Mr. McCarty had not been a defendant in this matter, no verdict of guilty could have been sustained as against Mr. Caddel for the reason that the only substantive evidence against him would have been mere association with the other alleged conspirators without any further evidence of actively or passively engaged in any acts whatsoever in furtherance of the designs or aims of the conspiracies. As pointed out in the case of *People* v. *Reid,* 195 Cal. 249, a Writ of Error Coram Nobis must issue when a valid defense exists from the facts

of the case, but which, without negligence on the part of the defendant, was not made, either through duress, fraud or excusable mistake, and these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.

In the case with which we are here concerned, the facts set forth in this petition must bring into operation the law laid down in *People* v. *Reid* so as to set aside the verdict and judgment in the matter and operate to release the petitioner from custody.

That there is presently no statutory remedy available to petitioner in that the judgment became final upon the denial of a hearing by the Supreme Court of the State of California, and that the facts as disclosed in this petition and affidavits are such that if they had been known prior to the trial or during the trial, a verdict of guilty could not have been rendered as against petitioner, and had they been known prior to the motion for a new trial, such motion would of necessity have had to have been granted by way of setting aside the verdict of the jury and finding petitioner not guilty.

WHEREFORE, petitioner prays that this Court grant a Writ of Certiorari in this matter to review the decision of the Supreme Court of the State of California.

Dated this 18 day of July, 1951.

WILEY H. CADDEL,
Petitioner.

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No. 242

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1951

WILEY H. CADDEL,

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v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

EDMUND G. BROWN
Attorney General of the
State of California

CLARENCE A. LINN
Assistant Attorney General of the
State of California

DORIS H. MAIER
Deputy Attorney General of the
State of California

Attorneys for Respondent

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